No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO and SECURITY-FIRST NATIONAL BANK,

Appellees.

APPELLANTS' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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Preliminary Statement.

Appellants submit the following in reply to appellees' brief.

In their opening brief appellants discussed the several legal principles which are, or are asserted to be, involved, with specific reference to the record in this case. And we made the following points: (1) that the judgment of dismissal was not justified on the basis of *res judicata;* and (2) that the barring of appellants' probate claim against the estate of William S. Heigho, deceased, by a probate statute of limitations did not necessarily constitute a defense to appellants' action against appellees as transferees under an *inter vivos* fraudulent conveyance.

We regret that appellees' brief does not attempt to meet our contentions point by point so that the opposing

contentions could readily be matched up and judged, one against the other. Upon analysis, appellees' brief is seen to do the following:

1. Appellees repeat generalities concerning the doctrine of *res judicata,* without specific application to the facts of this case, and continue to assert that appellants' claim is barred thereby, without answering appellants' specific contentions;

2. Appellees do not discuss our Point II or cite any authority for their (assumed) proposition that a statute of limitations defense available to a debtor (or his probate estate) necessarily bars an action to recover out of fraudulently-conveyed property in the hands of his transferees; and

3. Appellees now contend:

(a) That the judgment of dismissal is justified for want of an indispensable party, *viz:* Heigho or his probate estate;

(b) That the procedure authorized by Section 579, California Probate Code, is exclusive, that is to say, that creditors may not proceed directly against transferees to recover out of fraudulently-conveyed property; and

(c) That the judgment under review was a consent judgment and hence not appealable.

In what follows we shall deal with appellees' new contentions.

ARGUMENT.

I.

There Is No Lack of Any Indispensable Party.

Contending that Heigho or his probate estate is an indispensable party, appellees assert general propositions concerning indispensable parties and cite decisions which have nothing to do with this case.

In our opening brief we pointed out that a living debtor-transferor is not a necessary or indispensable party to an action against transferees:

> Section 3439.09, California Civil Code (rather than Code of Civil Procedure as mistakenly cited on page 4 of our opening brief).

And the personal representative of a deceased fraudulent grantor is not a necessary party to an action against his transferees:

> *Liuzza v. Bell,* 40 Cal. App. 2d 417, 424, 104 P. 2d 1095.

II.

Suit by a Decedent's Personal Representative Under Section 579, California Probate Code, Is Not an Exclusive Procedure; Creditors May Proceed Directly Against Transferees.

Without citation of pertinent authority appellees assert that a "Decedent's Alleged Creditor Can Proceed Only Through Estate." Not so:

> *Liuzza v. Bell,* 40 Cal. App. 2d 417, 104 P. 2d 1095.

III.

The Judgment Under Review Was Not a Consent Judgment.

Appellees now contend that the judgment of dismissal was a consent judgment and hence not appealable, and in that connection they refer to a statement in appellants' memorandum of points and authorities filed August 23, 1961, to the effect that "As presently advised" their counsel was "unable to state to the Court any reason why the defense [of *res judicata*] is not good." [R. p. 45, lines 7-9.]

What happened was that after impleading the two sets of defendants, plaintiffs (appellants) were at first inclined to let them fight it out between themselves to determine which was liable. Accordingly, plaintiffs' counsel invited counsel for the "Surr & Hellyer defendants" to assume responsibility for opposing the motion to dismiss, and they did so. But plaintiffs did not consent to the granting of the motion.

In any event, the order of dismissal was merely interlocutory; and it is not the judgment under review. After the motion to dismiss was granted it became apparent to counsel for plaintiffs that at the trial the "Surr & Hellyer defendants" were still going to defend on the ground that the claim against appellees had not been lost, so that the "Surr & Hellyer defendants" were not liable for damages for negligence. At trial the court might reconsider its holding on the motion to dismiss (as it might: Rule 54(b), F. R. C. P.) and decide that the claim against the "Heigho Trust defendants" had not been lost after all. But such a decision, made in the absence of the "Heigho Trust

defendants," would not bind them, and plaintiffs would be under the necessity of starting all over against those defendants. It is obviously desirable for the action to be tried once and for all against both sets of defendants, so that the liability of one or the other can be finally determined. Accordingly, plaintiffs moved to vacate the order of dismissal, and when that motion was denied plaintiffs moved for reconsideration, which was also denied. Judgment of dismissal was entered pursuant to Rule 54(b), F. R. C. P., so as to permit plaintiffs to appeal. There is nothing to appellees' contention that the judgment was rendered by consent.

Conclusion.

It is submitted that appellees have not effectively answered the points made in appellants' opening brief, that appellees' new contentions are without merit, that the District Court erred in rendering judgment of dismissal, and that the judgment should be reversed and the cause remanded for further proceedings against appellees as well as the other defendants.

Respectfully submitted,

Richard A. Perkins,
Attorney for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD A. PERKINS,
Attorney for Appellants.